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Decision 00-11-041 November 21, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Order Approving Proposed Settlement Agreement Between Southern California Edison Company and Coso Finance Partners et al.	Application 00-04-042 (Filed April 26, 2000)

OPINION APPROVING SETTLEMENT

1. Summary

We approve an unopposed settlement agreement (Settlement) which resolves litigation arising from Interim Standard Offer 4 (ISO4) contracts between Southern California Edison Company (Edison) and three geothermal qualifying facility (QF) projects, collectively referred to as the Coso Projects.[1] We find that the Settlement reflects a fair compromise of the parties' complex, contentious disputes, yields substantial ratepayer benefits, and should be approved.

2. Background

The Coso Projects are located on land owned by the U.S. Navy and the Bureau of Land Management in Inyo County. The individual QFs, known as

[1] A QF is a small power producer or cogenerator that meets federal guidelines under the Public Utilities Regulatory Policies Act of 1978 (PURPA) and thereby qualifies to supply generating capacity and electric energy to electric utilities. (See Pub. L. No. 65-617, 92 Stat. 3177 (1978).) Utilities were required to purchase this power at prices approved by state regulatory agencies.

Navy I, Navy II, and BLM, are owned by the Coso Partnerships.[2] Each QF consists of geothermal production wells, power block (generating) units, and injection wells. Each QF has three power block units; these units went into operation in phases (i.e. at different times).

Navy I is subject to an Edison ISO4 power purchase contract (QFID 3008) for up to 24 years dated June 4, 1984; Navy II is subject to an ISO4 contract (QFID 3029) for up to 20 years dated February 1, 1985; and BLM is subject to an ISO4 contract (QFID 3030) for up to 30 years dated February 1, 1985. Copies of the contracts are included in a separate document filed with the application as Exhibit SCE-3.

The litigation in question concerns consolidated proceedings pending since 1997 in the Inyo County Superior Court. Edison initiated the litigation with a complaint alleging that the Coso Projects, in an effort to maintain production at full output levels, unlawfully vented hydrogen sulfide gas from unmonitored release points during a period beginning in about 1990. Edison asserted that these violations constituted material breaches of the ISO4 contracts and sought cancellation of the contracts and recovery of all payments made from 1990 forward from the Coso Partnerships and certain of their owners (collectively, the Coso Parties). Alternatively, Edison sought damages measured by the difference

[2] The Coso Partnerships are the successors in interest to those entities which originally executed the ISO4 contracts with Edison. The application relates the historical chain of ownership and operation of each of the QFs. In sum, up until February 1999, CalEnergy Company Inc. (CalEnergy), and three of its wholly owned subsidiaries (the managing general partners of the Coso Partnerships), operated the three QFs and administered the ISO4 contracts pursuant to internal agreements. CalEnergy then sold its interests in the Coso Projects to Caithness Energy LLC, which had been involved in the Coso Projects, previously, through affiliates.

between the above-market amounts paid for any illegally generated electric power and the market price.

The Coso Parties denied any illegal venting had occurred and in a cross-complaint and a separate lawsuit, asserted numerous claims of their own against Edison, including three breach of contract claims for alleged underpayments under the ISO4 contracts. The application refers to the Coso Parties' three breach of contract claims as the "First Period Claim," the "Simultaneous Buy-Sell Claim," and the "Forecast Energy Table Claim." Pages 11-12 of the application include concise summaries of the claims, which we repeat in substantial part below; however, we omit the text (redacted in the public version of the application) which identifies the amount in controversy on each claim.

The First Period Claim: The Coso Partnerships elected to receive forecasted fixed energy prices during the ten-year First Period in the ISO4 contracts. Edison contended there was only a single First Period under each contract beginning when the first of the three power block units at each QF commenced commercial operation. The Coso Partnerships contended that Edison should recognize that a separate ten-year First Period began when each generating unit became commercially operational.

Simultaneous Buy-Sell Claim: The Coso Partnerships contended that based on the "operating option" selected under each of the ISO4 contracts, they were entitled to sell to Edison, at ISO4 contract prices, the gross output of their generators and to purchase from Edison, at the applicable tariff rate, the electricity they consumed internally to operate their QF facilities. The Coso Partnerships further contended that Edison breached the contracts by paying IOS4 contract prices only for the net electricity from the QF facilities, that is, the

gross output of the generators less the electricity consumed for internal purposes.[3]

Forecast Energy Table Claim: The First Period under two of the three ISO4 contracts expired in 1999, and early 2000, respectively. However, the forecast energy price tables attached to these contracts specified First Period prices only through 1998. The Coso Partnerships contended that Edison breached those contracts by using 1998 energy prices, rather than higher prices specified in more recently prepared tables which were attached to other Edison QF contracts, for First Period energy deliveries in 1999 and early 2000.

The Coso Parties also alleged that Edison affiliates within the Mission Group ultimately were liable for any illegally vented gas since these entities had been involved in the QF construction (and were parties to previous construction litigation and settlement of that litigation). In addition, the Coso Parties asserted a number of other claims, including claims for defamation, interference with contract, and with respect to the three breach of contract claims described above, claims for discrimination, unfair competition and for compensatory and punitive damages under Pub. Util. Code § 2106. The Coso Parties' second amended

[3] On July 28, 2000, several months after filing this application for approval of the Settlement, Edison filed a petition for modification of Decision (D.) 83-09-053 and D.82-12-120. The petition asks the Commission to interpret Edison's ISO4 contracts to prohibit "Simultaneous Buy-Sell." Footnote 8 of the Petition refers to the litigation underlying the Settlement at issue in this proceeding but severs it from the prospective, generic relief sought in the Petition. Edison states, in relevant part:

> "This litigation, which also involved numerous unrelated claims, was recently settled on a confidential basis. … This Petition is not directed at that settlement, which [Edison] continues to fully support." (Petition, Footnote 8.)

complaint asserted various claims for unfair competition and false advertising under Bus. & Prof. Code §§ 17200 et seq. and 17500 et seq.

After engaging in nearly two years of comprehensive discovery (administered by the court because of its complexity and scope) as well as extensive pre-trial motion practice, the parties agreed to a stay of proceedings in order to explore settlement. The venting claim, the three contract claims and the allegations tied to the prior construction dispute formed the focus of the parties' settlement discussions. The application, at page 16, states that Edison assigned no value to the other claims and that "they did not materially impact the parties' settlement discussions."

Edison and the Coso Parties entered in the Settlement after more than ten months of negotiation, including a voluntary three-day mediation with retired California Supreme Court Justice Edward A. Panelli serving as the neutral mediator. As explained in greater detail in Justice Panelli's prepared testimony (submitted with the application as Exhibit SCE-1), the terms of the Settlement are consistent with the terms he determined would be a reasonable resolution of the dispute. The Settlement contains a confidentiality clause which bars all parties from disclosing the material terms of their agreement. Accordingly, the application's only public disclosure, at page 2, is that the Settlement "yields substantial ratepayer benefits" and avoids the burden and uncertainty of continued litigation. However, the Settlement also provides that unless the Commission approves the material terms of the Settlement in a final decision (no longer subject to appeal) by January 15, 2001, the parties may terminate the Settlement and resume litigation.

In addition to the Settlement, the parties ultimately entered into two other confidential settlement agreements to resolve the entirety of the consolidated

litigation with respect to all parties. The other two settlement agreements do not require Commission approval. However, Commission approval of the Settlement is a condition precedent to the other two agreements becoming effective. Edison has included all three settlement agreements in a separate document, Exhibit SCE-2, tendered under seal with its Motion for Protective Order, filed concurrently with the application on April 26, 2000. We address Edison's motion in Section 3.3, below.

3. Discussion

3.1 Test for Approving Settlement Agreements

In determining whether a settlement is fair, adequate, and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[4] The Commission also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled.[5] The Commission will not approve a settlement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest."[6]

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[4] D.96-05-070, *mimeo.*, at 5, 66 CPUC2d 314, 317 (1996); *see also* D.96-12-082, *mimeo.*, at 9, 70 CPUC 427, 430 (1996), *Re Pacific Gas and Electric Company*, D.88-12-083, 30 CPUC2d 189, 222 (1988).

[5] D.96-05-070, *mimeo.*, at 16-7.

[6] Commission Rules of Practice and Procedure, Rule 51.1(e).

Moreover, we have held in the context of evaluating utility-QF settlements that the mere existence of a dispute or a "colorable claim" regarding a contract does not ensure that any settlement of that contract is reasonable. The "colorable claim" must raise "substantive issues of law and fact."

> Before a utility enters into any renegotiation of a [QF] power purchase agreement, it presumably has evaluated the strength of the other party's position. If the other party does not have a unilateral right to make modifications to the contract, then the utility should determine what reasonable concessions can be obtained in exchange for the contract modification sought by the other party.[7] The simple conclusory assertion that a dispute exists is not sufficient grounds to modify a contract.[8]

3.2 Application of Test Approving Settlement Agreements to This Proceeding

Each of the foregoing factors militates in favor of the Settlement at issue in this proceeding. While the terms of the Settlement are confidential, Edison has furnished the Commission full details under seal. We have examined all the sealed documents: the Settlement; the parties' other two settlement agreements; the portions of the application which discuss the parties' settlement efforts and Edison's rationale for Commission approval; and the detailed, prepared testimony.

The parties' disputes turn on competing factual assessments and differing interpretations of law with respect to those facts. Justice Panelli's

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[7] D.98-06-021, 1998 Cal. PUC Lexis 474, at *15, citing D.98-04-023, *mimeo.*, at 13, and D.87-07-026.

[8] *See also* D.98-04-023.

prepared testimony provides a very clear summary of the parties' various settlement positions and a thoughtful assessment, claim by claim, of the relative strengths and weaknesses of each side's case.

In our view, the Settlement reflects the relative risks and costs of continued litigation of the disputed issues. The Settlement's terms lie within the range of possible outcomes had the matter gone to trial. Considering the range of possible outcomes and the attendant uncertainty, we agree that the Settlement is a positive outcome. We concur with Edison's qualitative statement, in the public version of the application, that the ratepayer benefits are "substantial." Without disclosing the details of the parties' Settlement, we further observe that it allows the parties to put their collective disputes behind them and permits each of the ISO4 contracts to run for the remainder of the contract period.

There is no evidence of collusion. The parties' identities are separate and their interests, distinct. We note that settlement negotiations commenced nearly two years after the commencement of the litigation, and well after the parties had embarked upon comprehensive discovery. The arbitration process allowed the parties a further opportunity to review the relative strengths and weaknesses of their litigation positions. Every indication is that counsel on each side adequately analyzed the risks and benefits of their clients' respective positions, and advised their clients competently.

Thus, the Settlement meets the test of reasonableness and should be approved. Accordingly, as Edison asks, the payments made by Edison following the Settlement to each of the Coso Projects under their respective ISO4 contracts should be deemed reasonable. These payments should be recoverable by Edison through rates, subject only to Edison's prudent administration of those contracts and the Settlement.

In addition, to ensure that ratepayers receive all quantitative value attributable to the substantial benefits of the Settlement, Edison shall make the appropriate adjustment to its Transition Cost Balancing Account (TCBA), in accordance with the method approved in D.98-06-069. Procedurally, the facts underlying the Settlement are sufficiently congruent with the facts the Commission reviewed in D.98-06-069 to warrant utilization of the ratemaking treatment approved in that proceeding.

3.3 Edison's Motion for Protective Order

By motion filed concurrently with the application, Edison seeks confidential treatment of virtually all information reflecting the terms of its Settlement with the QFs and their owners. While Edison characterizes the Settlement's ratepayer benefits as "substantial," Edison provides no other, unredacted, qualitative description and no unredacted quantification. Edison justifies its claim for protection on the grounds that: (1) the confidentiality clause in the Settlement prohibits Edison from revealing the Settlement terms; (2) the Settlement terms are confidential and proprietary to Edison because disclosure could cause Edison competitive harm in negotiating settlements of future disputes involving similar issues, and (3) public disclosure of the Settlement could disadvantage Edison in litigation with other parties by allowing such parties to exploit concessions that Edison may have given under the unique circumstances of these particular disputes. (See Motion for Protective Order, at 3-4.) As to its second argument, Edison points out that disclosure of the Settlement terms could impair Edison's ability in the future to obtain the best possible settlements on behalf of its ratepayers. Edison's motion is unopposed.

We note that in other contexts, Edison has agreed to make public the aggregate monetary payment required under a settlement even while asserting

the need for confidentiality of individual payments. For example, in D.98-12-072, Edison agreed to aggregate disclosure as a means of settling a dispute over its entitlement to a protective order. On the other hand, we have approved protective orders in some QF-utility cases where all of the terms of the settlement are kept confidential.[9]

We conclude that disclosure of the Settlement terms, here, not only would put Edison in breach of the Settlement's confidentiality provisions but might jeopardize ratepayers' interests with respect to other litigation or potential litigation. Edison has demonstrated good cause to maintain the terms of the Settlement in confidence. Therefore, we grant Edison's motion for protective order.

4. Public Utilities Code Section 311(g)(2)

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311 (g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. The Coso Projects are three geothermal QFs (Navy I, Navy II, and BLM) owned by the Coso Partnerships, which are themselves owned by the Coso Parties. Each of the QFs is subject to an ISO4 power purchase contract with Edison.

2. The complex litigation underlying the Settlement concerns consolidated proceedings pending since 1997 in the Inyo County Superior Court.

[9] D.99-08-008, 1999 Cal. PUC Lexis 499, at *4; D.98-06-021, 1998 Cal. PUC Lexis 474, at *20; D.98-02-112, 1998 Cal PUC Lexis 235, at *3.

3. After engaging in nearly two years of comprehensive discovery (administered by the court because of its complexity and scope) as well as extensive pre-trial motion practice, the parties agreed to a stay of the Inyo County Superior Court proceedings in order to explore settlement.

4. The venting claim, the three breach of contract claims (i.e., the "First Period Claim," the "Simultaneous Buy-Sell Claim," and the "Forecast Energy Table Claim") and the allegations tied to the prior construction dispute formed the focus of the parties' settlement discussions.

5. The parties entered into the Settlement after more than ten months of negotiation, including a voluntary three-day mediation with retired California Supreme Court Justice Edward A. Panelli serving as the neutral mediator.

6. While the terms of the Settlement are confidential, Edison has furnished the Commission full details of the Settlement under seal.

7. No protests of the application have been filed.

8. Edison seeks a protective order for certain portions of the Application and of Exhibit SCE-1 (which contains prepared testimony) and for the entirety of SCE-2 (which contains the parties' Settlement) on the grounds that dissemination of the contents of these documents would harm Edison and ratepayers.

9. No hearing is necessary.

10. Procedurally, the facts underlying the Settlement are sufficiently congruent with the facts the Commission reviewed in D.98-06-069 to warrant utilization of the ratemaking treatment approved in that proceeding.

Conclusions of Law

1. The Settlement between Edison and the Coso Parties is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The application should be granted as provided in the following order.

3. The payments Edison has made to each of the Coso Projects under their respective ISO4 contracts should be deemed reasonable.

4. These ISO4 payments should be recoverable by Edison through rates subject only to Edison's prudent administration of the ISO4 contracts and the Settlement.

5. Edison's motion for protective order should be granted.

6. The ratemaking treatment approved in D.98-06-069 is applicable to the Settlement.

7. In order that benefits of the Settlement may be realized promptly, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application of Southern California Edison Company (Edison) for approval of the settlement of litigation regarding the Coso Projects (Settlement) between Edison and the Coso Parties, as set forth in Exhibit SCE-2 to the application, is granted.

2. The payments made by Edison, following the Settlement, to each of the Coso Projects under their respective Interim Standard Offer 4 (ISO4) contracts are deemed reasonable. These payments are recoverable by Edison through rates, subject only to Edison's prudent administration of the ISO4 contracts and the Settlement.

3. Edison's motion for a protective order is granted to the extent set forth below.

   a. Designated portions of Edison's application and Exhibit SCE-1, and Exhibit No. SCE-2 in its entirety, all of which

Edison filed under seal as an attachment to its motion for protective order, shall remain under seal for a period of two years from the date of this decision. During that period, the foregoing documents or portions of documents shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

b. If Edison believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

4. To ensure that ratepayers receive all quantitative value attributable to the substantial benefits of the Settlement, Edison shall make the appropriate adjustment to its Transition Cost Balancing Account, in accordance with the method approved in Decision 98-06-069.

5. This proceeding is closed.

This order is effective today.

Dated November 21, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners

I will file a concurrence.

/s/ LORETTA M. LYNCH
President

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President Loretta M. Lynch, Concurring:

Although I will vote for this decision, I am concerned over the confidentiality provisions attached to the settlement. These provisions seek to limit the ability of the Commission to disclose to the public the terms of the settlement. Most of the Qualifying Facility (QF) contract disputes and contract renegotiations brought before this Commission involve substantial sums of money, often in the tens of millions of dollars, if not more. Members of the public have no way of knowing from the Commission decision approving or rejecting these disputes how much money is involved.

I believe that there should be greater public disclosure of ratepayer costs and benefits that result from these settlements. Wherever possible, they should be made public so that ratepayers can be fully informed of the magnitude of the financial consequences of our actions.

/s/ Loretta M. Lynch .
LORETTA M. LYNCH
President

San Francisco, California
November 21, 2000